LARC
Land & Accountability Research Centre

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Chairperson and Honourable Members

Portfolio and Select Committees: Co-operative Governance and Traditional Affairs

Parliament of South Africa

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Submission on the Traditional and Khoi-San Leadership Bill, 2015

Introduction

The Land and Accountability Research Centre (LARC) – formerly the Rural Women's Action Research Programme at the Centre for Law and Society (CLS) – is based in the University of Cape Town's Faculty of Law. LARC forms part of a collaborative network, constituted as the Alliance for Rural Democracy, which provides strategic support to struggles for the recognition and protection of rights in the former homeland areas of South Africa. An explicit concern of LARC is power relations, and the impact of national laws and policy in framing the balance of patriarchal and autocratic power within which rural women and men struggle for change at the local level.

In this context, LARC is concerned that the Traditional and Khoi-San Leadership Bill, 2015 [B 23–2015] (hereafter "the Bill"), will be detrimental to the full recognition of a "living" customary law, as mandated by the Constitution, and to the democratic rights of citizens in the former homeland areas of South Africa.

The points that LARC would like to raise with the Committees, elaborated in further detail below, can be summarised as follows:

1. The Bill entrenches geographic boundaries derived from colonial and apartheid distortions of customary governance systems.
2. These boundaries lock people into territorial jurisdictions that are used to justify unaccountable authority by traditional leaders.
3. The result is the imposition of tribal identities and the suppression of countervailing forms of representation that runs contrary to the historical narratives articulated by people living in the former homelands.
4. These deep-seated flaws in the Bill's architecture are not sufficiently mitigated by the weak transformative mechanisms provided – particularly in light of the recorded failures of these mechanisms over the past decade.

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It is therefore LARC's submission that the Bill is fundamentally inconsistent with the promises made to citizens during the transition to democracy and the rights and values enshrined in the Constitution of South Africa. For these reasons we call for the Bill to be rejected by Parliament and propose that government uses living customary law, shared identity and consensual legitimacy as the basis for recognising traditional groupings and authorities, rather than the distorted legacy of "tribal" boundaries left behind by the colonial and apartheid governments. This requires that government not only rethink many of the administrative procedures incorporated into the Bill, but also undertake a process of consultation with traditional groupings and rural constituencies to understand their lived customary law identities. This should inform a new vision for the regulation of traditional governance, based primarily on the interests and lived traditions of customary groupings, rather than sustaining a tainted system to the benefit of a small elite.

1. Bill entrenches colonial and apartheid distortions through geographical boundaries

Clause 70 of the Bill describes a process for the transitional recognition of pre-existing community groups, councils and leaders. It is unclear how the clause will be implemented in practice since it confusingly describes the simultaneous recognition of structures existing in law ***prior to*** the commencement of the Traditional Leadership and Governance Framework Act 41 of 2003 ("Framework Act") and the recognition of structures created ***while*** the Framework Act has been in force. What is clear is that the transitional process uses as its building blocks the so-called "tribal" structures that were defined in law by successive undemocratic governments.

The "tribes" that are deemed to have legal status under this Bill, as in the Framework Act, are those that were originally defined by colonial and apartheid government officials in terms of the Native Administration Act 38 of 1927 and that remained in existence throughout the Bantustan period up until the transition to democracy. In terms of the Bill, these "tribes" would now be recognised as traditional communities. Yet, historical narratives have revealed the crude and oppressive nature of these processes of consolidating people into ethnic groups or "tribes" in order to create separate legal realms in the so-called homelands. The concomitant legal recognition of "chiefs" to head "tribes" under the Native Administration Act has also been given new life under the Bill – renamed to senior traditional leaders – despite the tainted history of chiefs being appointed in order to facilitate an oppressive government's agenda. In 1959, Nelson Mandela wrote:

> Moreover, in South Africa, we all know full well that no Chief can retain his post unless he submits to Verwoerd, and many Chiefs who sought the interest of their people before position and self-advancement have, like President Luthuli, been deposed....Thus, the proposed Bantu Authorities will not be, in any sense of the term, representative or democratic.[1]

Mandela describes a process of manipulation by the apartheid government that resulted in many respected leaders, who enjoyed authority based on their legitimacy and customary affiliation by people, being replaced. The Bill consciously maintains this status quo, creating a commission to attempt to rectify these past manipulations rather than starting anew.

In addition to the recognition of "tribes" with "chiefs", the creation of the Bantustans was most directly achieved through the definition of geographical jurisdictions for "tribal authorities" in terms of the Bantu Authorities Act 68 of 1951. Through hundreds of Gazette notices, for every recognised "tribe" and "chief" a "tribal authority" was also established with a specified area of

[1] Nelson Mandela "Verwoerd's Grim Plot" (May 1959).

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jurisdiction. This process was undertaken in the decades after the Bantu Authorities Act's promulgation and was facilitated by a package of laws that restricted the occupation and ownership of most of the country's land by black South Africans. The creation of tribal authorities sometimes went hand-in-hand with forced removals, as people were forced off their ancestral land and dumped in new areas with people unknown to them under the umbrella of one "tribal authority". Together, these tribal authority jurisdictions formed the boundaries of the homelands and acted as territories of local government within the homeland governance systems.

These same geographical boundaries are reinforced through the Bill's explicit recognition of "tribal authorities" as traditional councils in clause 70. Effectively, the same separate legal and geographical realms are recognised for traditional governance institutions as those defined during apartheid. Not only does this betray the Constitutional principle of "one law for one country", it betrays historical struggles against the establishment of tribal authorities in areas like Pondoland. These struggles recognised that tribal authorities were representative of, and instrumental to, an oppressive regime's distortion of customary laws and the nature of traditional governance systems. In 1962, Albert Luthuli noted:

> The modes of government proposed are a caricature. They are neither democratic nor African. The [Promotion of Bantu Self-Government Act] makes our chiefs, quite straightforwardly and simply, into minor puppets and agents of the Big Dictator. They are answerable to him and to him only, never to their people. The whites have made a mockery of the type of rule we knew. Their attempts to substitute dictatorship for what they have efficiently destroyed do not deceive us.[2]

If the Bill is allowed to reproduce this history, the struggles for democracy and the equal recognition of African customary values embodied in the Constitution will have been for nothing.

2. Bill locks people into the authority of unaccountable traditional leaders

The geographical boundaries entrenched by clause 70 of the Bill work in conjunction with provisions providing or allocating traditional leaders certain roles and functions at clauses 15, 19, 20 and 25 to effectively establish territorial jurisdictions for traditional leaders. This creates the dangerous impression that traditional leaders have exclusive authority over traditional community members living within the traditional council boundaries.

The result is that people are locked into precisely the same system of autocratic governance that, under colonialism and apartheid, was established without regard for the rights, choices and customary laws of people.[3] The Bill assumes that if you live within the geographical boundaries of the former homelands today, you should be subject to the rule of a chief and tribal authority – regardless of the history of constituting "tribes" or the process by which "chiefs" were deposed and appointed by the colonial and apartheid governments.

The popular saying 'kgosi ke kgosi ka morafe' or 'inkosi yinkosi ngabantu' shows that traditional leaders are supposed to gain their authority and legitimacy from the people they lead. Yet, the Bill starts with the opposite idea that traditional leaders' authority is based on the existence of a defined territory that was declared and established through government proclamation. The Bill goes so far as to specify at clause 3(4) that in order for a traditional community to gain recognition, it must first

[2] Albert Luthuli *Let My People Go* (Collins, 1962) at 200.
[3] Thuto Thipe "The boundaries of tradition: an examination of the Traditional Leadership and Governance Framework Act" *Harvard Human Rights Journal* (November 2014).

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have a senior traditional leader. In other words, traditional leaders are put at the centre of a traditional community's customary law identity.[4] The Bill's assumption is thus that traditional leaders create traditional communities, contrary to customary law which states that traditional leaders exist because traditional communities have recognised their legitimate authority.

This undermines the consensual and reciprocal nature of the relationship between traditional leaders and the people they lead according to customary law. Through clause 70's top-down recognition of a traditional leader's authority based solely on the distorted jurisdictional boundaries created during apartheid, the Bill removes traditional leaders' accountability to ordinary people. Instead, traditional leaders become more accountable to the government that provides them with certificates of recognition and salaries.

Govan Mbeki described how the imposition of the Bantu Authorities system similarly changed the nature of the relationship between traditional leaders and ordinary people:

> Many Chiefs and headmen found that once they had committed themselves to supporting Bantu Authorities, an immense chasm developed between them and the people. Gone was the old give-and-take of tribal consultation, and in its place there was now the autocratic power bestowed on the more ambitious Chiefs, who became arrogant in the knowledge that the government's might was behind them.[5]

Yet, historically customary systems had built-in accountability mechanisms for situations where traditional leaders lost legitimacy or acted contrary to the interests of their people. Simply put, if people no longer wished to be ruled by a corrupt or incompetent leader, they would secede or support succession disputes to justify the leader's removal.[6] Unpopular leaders did not reign for long. When customary governance is no longer based on popular affiliation, but on a boundary defined in law, the power dynamics of the system are altered in a way that favours autocratic and patriarchal rule.[7] This is particularly a problem in cases where the content of customary law is contested between traditional leaders and ordinary people. Where traditional leaders are put in a position where their authority cannot be challenged by ordinary people, there is opportunity for leaders to commit abuses or be involved in corrupt practices in the name of a "customary law" defined solely by the traditional leader and for the benefit of his personal interests.

One example that enjoyed widespread media coverage in recent months has been the "customary law" rhetoric used by some to justify criminal acts by AbaThembu King Buyelekhaya Dalindyebo against his so-called "subjects".[8] Yet, it is doubtful that the victims would agree that the violent acts committed against them embody customary values or customary ways of dealing with disputes.[9] Whose version of what is "customary" is to be protected by the law? Is our legal system recognising versions of customary law based on mutual respect and consensus, or versions of customary law based on intolerance and brutality? The undemocratic and unaccountable traditional

[4] Aninka Claassens "Back to the bad old days" City Press (11 October 2015).
[5] Govan Mbeki *South Africa: The Peasants' Revolt* (International Defence and Aid Fund, 1984), at 119-120.
[6] Peter Delius "Contested terrain: land rights and chiefly power in historical perspective" in Aninka Claassens and Ben Cousins (eds) *Land, Power and Custom: Controversies generated by South Africa's Communal Land Rights Act* (UCT Press, 2008) at 214ff.
[7] Aninka Claassens "Power, accountability and apartheid borders: the impact of recent laws on struggles over land rights" in Aninka Claassens and Ben Cousins (eds) *Land, Power and Custom: Controversies generated by South Africa's Communal Land Rights Act* (UCT Press, 2008) at 262ff.
[8] See for example, Thami ka Plaatjie "We jail a king at our peril" *City Press* (3 January 2016), and Phathekile Holomisa "Constitutional Court fails to give leadership on AbaThembu king matter" *Sowetan* (29 December 2015).
[9] Nolundi Luwaya "King Dalindyebo's disregard for customary law is the problem, not his conviction" *Daily Maverick* (15 January 2016); Sindiso Mnisi Weeks "Of a cruel king and the bitter battle for the soul of South Africa's democracy" *Mail & Guardian* (15 October 2015).

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governance system introduced by the Bill seems to be inviting the latter. Nowhere does the Bill require traditional leaders to consult ordinary people, even in relation to decisions that have far-reaching implications for people's lives.

The Bill allows for the broad allocation of roles to traditional leaders at clause 25. The Framework Act similarly allows national or provincial government to give roles to traditional leaders or traditional councils at section 20, in respect of a closed list of subject areas such as health and agriculture. Since the Framework Act's commencement, this has resulted in two unsuccessful attempts to legislate far-reaching powers for traditional institutions. The first was the Communal Land Rights Act 11 of 2004, and the second was the Traditional Courts Bill 15 of 2008/1 of 2012. The Communal Land Rights Act never came into force and was struck down by the Constitutional Court in 2010.[10] The Traditional Courts Bill was met with fierce opposition during consultations by the provincial legislatures, at national Parliament, and in the media – such that it could not garner a majority of provincial votes to be passed in the National Council of Provinces. Much of the opposition to these two laws decried the ways in which they were based on rigid colonial and apartheid understandings of customary law and traditional leadership.

Clause 25 of the Traditional and Khoi-San Leadership Bill is similar to section 20 of the Framework Act but substantially broadens the scope of government departments' discretion to provide roles to traditional leaders and councils. A comparison of the two provisions reveals that the Bill's clause 25 does not provide sufficient guidance on what roles can be given to traditional leaders and councils and what procedures should be used to do so – contrary to the principles of administrative law.[11] Instead, clause 25 states that roles can be given in respect of "any" of government's functions, leaving the nature and extent of these functions completely open to interpretation. Furthermore, in terms of clause 25 it is completely up to the relevant government department to decide the process through which roles can be given to traditional leaders and councils, whereas section 20 of the Framework Act provides at least some guidance as to an appropriate applicable procedure.

Not only does this render clause 25 vague and uncertain, it creates the possibility for roles to be given through opaque administrative decisions, such as delegations, as opposed to public law-making processes in the national and provincial legislatures. It will be difficult for members of the public to challenge the allocation of roles to traditional institutions when there is no obligation (as with legislative processes) to make the public aware that roles have been allocated in the first place. Parliament would also be hindered in its role as oversight body, since it would be impossible to monitor the performance of public functions when it is unclear who is responsible for performing those functions and to what extent. More than this, the haphazard exercising of discretion by departments at national and provincial level could result in traditional leaders across the country having different roles to each other. In 2015 media reports highlighted the tensions currently existing between traditional leaders precisely because of the vastly different treatment they receive from provincial governments in respect of salaries and resources.[12] Inequality within the institution of traditional leadership could thus be worsened considerably.

The Bill is furthermore silent on what the relationship will be between elected local government and traditional leaders, or what traditional leaders' roles will mean in relation to the Constitution's

[10] *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* (CCT100/09) [2010] ZACC 10; 2010 (6) SA 214 (CC); 2010 (8) BCLR 741 (CC) (11 May 2010).
[11] Lauren Kohn "The failure of an arranged marriage: the traditional leadership/democracy amalgamation made worse by the draft Traditional Affairs Bill" *Southern African Public Law* 29(2) (2014).
[12] S'Thembiso Msomi "Xhosa king demands to be treated like (Zulu) royalty" *Sunday Times* (24 May 2015); Monica de Souza "King's budget reeks of favouritism" The Mercury (27 August 2015).

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recognition of separate powers for separate branches of government. This is questionable in light of the Constitutional Court's finding in the 1996 *Certification* judgment that the Constitution explicitly does not provide traditional structures with governmental powers and functions.[13] The Court explained as follows:

> We do not feel that the objectors' interpretation… is correct. Had the framers intended to guarantee and require express institutionalisation of governmental powers and functions for traditional leaders, they could easily have included the words "powers and functions" in the first sentence of [Constitutional Principle] XIII.[14]

In Chapter 12 of the Constitution, section 211(1) explicitly states that the "institution, status and role of traditional leadership" is recognised "according to customary law" and "subject to the Constitution". This means that traditional leadership can only be recognised ***as it exists*** in customary law. Chapter 12 thus supports a version of traditional authority that is democratic, accountable, transparent, and based on principles such as consensus and affiliation that are inherent to customary law. If traditional leaders are to be provided with some public role in the constitutional era, this version of traditional authority is the only one that meets constitutional muster. If the Bill is instead an attempt to give powers that vest exclusively in the three spheres of government to traditional leaders and councils, then it is a dangerous and unconstitutional proposal. Not only could it have the effect of creating a fourth tier of government contrary to the Constitution's framework it would also be a distortion of the very nature of traditional leadership under customary law.

The Bill's drafters have attempted to avert criticism that it empowers traditional leaders to take over the functions of the three spheres of governance in the former Bantustan areas by including a qualification in clause 25 that was not present in previous versions of the Bill. Thus, clause 25(1) states that a role can be given to traditional leaders "[p]rovided that such a role may not include any decision-making power". It is submitted that this qualification will be meaningless when the provision is implemented in practice, since no mechanisms have been included for government to monitor whether traditional institutions are making decisions that should actually be made by government. It is in any event unlikely that traditional institutions will be able to perform the "roles" that they have been given by government without making at least some decisions along the way. By leaving the scope of the roles that could be provided to traditional institutions so vague, clause 25 of the Bill is open to misinterpretation and abuse in practice. The qualification in clause 25(1) is meaningless in that it does nothing to impose an enforceable limit on the exercise of power by traditional authorities acting against the best interests of ordinary people.

The Bill furthermore fails to incorporate a crucial limit on the exercise of power by traditional leaders in the form of community consultation.[15] Customary law is inherently participatory. People must be involved in decision-making within traditional communities and be free to have their say at public meetings. Consultation with public constituencies is also an important aspect of South Africa's participatory democracy and the rights of people to provide input on political processes and decisions that will affect them is well-established in the jurisprudence of the Constitutional Court.[16]

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[13] Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996) – hereafter "Certification I".
[14] Certification I at para 190.
[15] Phiwe Ndinisa "New Bill leaves communities at mercy of leaders" *Business Report* (30 October 2015); Thabiso Nyapisi "Traditional bill strips people of their rights" *Sowetan* (6 January 2016).
[16] See, for example, *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) (17 August 2006).

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In contrast, the Bill excludes ordinary people from being consulted on decisions that will affect them. This includes some decisions about which groups or sub-groups of people should be recognised, who should be recognised as traditional leaders and how many members there should be in traditional councils. Often, the Bill does not even provide for ordinary people living in traditional communities to be notified of decisions that have been taken that will affect them. Instead, the Bill highlights consultation with powerful elites such as the Houses of Traditional Leaders, royal families and traditional councils. The Bill therefore goes against the values of public participation in both customary law and the Constitution and privileges the voices of those people or groups who already have an advantage in rural and traditional politics.

3. Bill imposes tribal identities and supresses countervailing forms of representation

By using the Bantu Authorities system as the default building blocks for the present-day recognition of traditional structures, the Bill adopts many of the categories created under apartheid to define African people. These categories ignore the reality that rural areas are not made up of neat, separate "tribes". In some places people with different histories were forcibly moved into the same area, and labelled a "tribe" during apartheid. These groupings continue to live side-by-side today, with complex and intertwined histories. Even people who have a history as independent landowners are still deemed to fall under the jurisdiction of traditional leaders that were imposed on them during apartheid. Yet, the Bill adopts an understanding of their so-called "tribal" identities that ignores the fact that many "tribes" and "tribal authorities" were created through forced removals, land dispossession, and the imposition of pliable leaders. It is doubtful whether many existing customary groupings in South Africa would meet the demanding criteria for recognising new traditional communities included at clause 3(4) of the Bill because the provision fails to understand this history. For example, groupings who were subjected to decades of government manipulation during the processes of Bantustan consolidation are unlikely to be able to demonstrate "a proven history of existence" that is "distinct and separate". The same is true in respect of the recognition criteria for Khoi-San communities.

Due to this history, many people in the former Bantustan areas of South Africa dispute official "tribal" boundaries, or disassociate from the traditional community or leader who is their "official" representative. Yet, the Bill does not allow people to "opt-out" of the traditional community or the traditional leader that they have been placed under by default, and there is no means through which to reconstitute identities and groups by choice, as part of an "opt-in" system of consensual affiliation. Clauses 3 and 4 of the Bill fail to facilitate processes of secession by sub-groups within a recognised traditional community, who cease to recognise the legitimacy of an official overarching authority in terms of customary law. Instead, in order to apply for changes to community recognition sub-groupings are forced to interact with government via overarching traditional councils and leaders – even where these are precisely the institutions being challenged.

In this respect, the Bill treats the recognition of Khoi-San groupings and authorities fundamentally differently. The Bill sets up an "opt-in" system of consensual affiliation for Khoi-San communities whereby a Khoi-San leader's authority only extends to people who have specifically taken steps to affiliate with a particular Khoi-San identity and leader. In terms of the Bill, a person is not automatically Khoi-San because they live in a particular area. This provides a simple potential template for the recognition of all traditional groupings, which, importantly, does not rely on the boundaries of the former Bantustans as a default position.

In essence, the Bill distinguishes between jurisdiction over land for traditional authorities in the former Bantustans, and jurisdiction over people for Khoi-San authorities. For the former

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Bantustans, the Bill puts in place a hierarchy of traditional communities that occupy a geographical area over which traditional councils have jurisdiction and that are headed by traditional leaders. In other words, leaders and councils in the former Bantustans will have authority that is connected to a particular piece of land and whoever lives on it. This is a replica of the "tribal" boundaries system entrenched through the Bantu Authorities Act. On the other hand, Khoi-San leaders and councils do not have authority that is connected to a particular piece of land – instead, their jurisdiction extends only over people who elect to be part of the Khoi-San community. Khoi-San leaders and councils will have administrative seats based in one central location, not expanded areas of authority that go beyond an office. In the former Bantustans, traditional leaders and councils have authority not only at the traditional council office; the authority extends to all those living on the land included within the geographical jurisdictional boundaries derived from apartheid.

In communications about the Bill, government has repeatedly stated that the Bill is necessary in order to provide official recognition to Khoi-San customary institutions that have hitherto been neglected in the legal and political realm. Yet, the provisions of the Bill make it clear that, in respect of jurisdiction, government is not giving Khoi-San leadership structures the *same* recognition as traditional institutions in the former Bantustans. This is especially relevant in light of government's recent promises to Khoi-San groups that changes in the law will allow them to claim back land that was historically taken away from them.

As stated earlier, the Bill establishes a system of affiliation for Khoi-San communities that relies on self-identification to define membership. To practically implement this, the Bill requires that Khoi-San people put their names, identity numbers and contact details on a list when applying for recognition as a community. The rigid bureaucratic procedure set out in the Bill is problematic, yet government has nevertheless set the precedent that it is possible to base customary community identity on affiliation rather than on territory. It is arguable that a similar system could be put into place for traditional communities in the former Bantustans. This would do away with the imposed apartheid and colonial tribal boundaries that currently form the basis for traditional governance under the Framework Act and the Bill. Moreover the basic structure for an affiliation-based system is already contained in the recognition provisions for new traditional communities and councils contained in sections 2 and 3 of the Framework Act, which are then unfortunately undercut by the transitional mechanisms in s 28 of the Act.

If, like the Framework Act, the Bill retains the Bantustan boundaries system and prevents people from opting out of identities and institutions which they reject, the Bill will be affirming many of the oppressive practices that the Framework Act has elicited. One example is the practice of charging people within a traditional council area with compulsory fees called "tribal levies".[17] Where people fail (or refuse) to pay these levies to a traditional council, they are denied approval for burial ceremonies or proof of address letters that are essential for opening a bank account, obtaining a cellphone or applying for an identity document. Institutions will often only accept these letters if they have been stamped by a traditional council. As a result, if people live within a traditional council's jurisdiction they must be up to date on their "tribal levies" in order to access basic services.

The "tribal" boundaries entrenched by the Framework Act have also in practice resulted in the suppression of countervailing forms of customary representation. In the North West, for example, two cases concerning the standing of parallel forms of authority within the Bakgatla ba Kgafela traditional community have reached the Constitutional Court. In the first case, the traditional leader and authority deriving from apartheid attempted to ban community meetings called by any other

[17] Aninka Claassens "The resurgence of tribal taxes in the context of recent traditional leadership laws in South Africa" *South African Journal on Human Rights* 27(3) (2011).

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customary structures, claiming exclusive authority to determine when issues affecting the community can be discussed by ordinary people.[18] In this way, leadership at the "top" of the traditional hierarchy could quell dissent at village level and prevent talks about secession following widespread dissatisfaction among ordinary people about corruption and maladministration by the senior traditional leader and his councillors. In the second case, the same senior traditional leader obstructed a Communal Property Association chosen by the community from holding and managing land won through restitution.[19] In both cases, the Constitutional Court found in favour of the co-existing forms of representation that had gained legitimacy and been recognised by the customary community. The rights of people living within the former Bantustans to call meetings and manage land independent of a traditional authority were upheld.

Yet, other pending cases demonstrate that traditional authorities are still able to obtain interdicts against, and contest the standing of, community groups or activists that challenge the authority of traditional leaders or their unaccountable conduct. In some areas, this has resulted in brutal violence.[20]

4. Bill's problems not mitigated by weak and failed transformative mechanisms

During the Framework Act's drafting, Parliament justified retaining traditional institutions appointed and established in terms of apartheid legislation on the basis that provisions of the law would force these institutions to transform. The Framework Act thus includes two primary mechanisms to mitigate the damage of entrenching old apartheid and colonial traditional leadership structures. The first mechanism required that traditional councils include 40% elected members and one third women members by a certain deadline. The second mechanism established was the Commission on Traditional Leadership Disputes and Claims (popularly known as the Nhlapo Commission). The Framework Act mandated this Commission with investigating and assessing claims that in some areas illegitimate persons were holding official traditional leadership positions, or that legitimate positions had previously been undermined by the colonial and apartheid governments.

Yet, both of these mechanisms have failed to achieve broad democratic transformation of traditional leadership structures. Most provinces have failed to hold proper traditional council elections, while in Limpopo there have been no elections at all.[21] Provinces have failed to meet the deadlines set for transformation in the Framework Act[22] and many traditional councils still do not include one third women members. Where women ***are*** members on traditional councils, they are vulnerable to abuse by other councillors.[23]

The Disputes and Claims Commission was unable to deal with the enormous volume of claims brought before it after the Framework Act first came into force, and provincial committees have since been set up to distribute the load. Meanwhile, many of those cases that ***have*** been dealt with by the Commission or its provincial committees are being challenged in court. For example, in

[18] *Pilane and Another v Pilane and Another* (CCT 46/12) [2013] ZACC 3; 2013 (4) BCLR 431 (CC) (28 February 2013).
[19] *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority and Others* (CCT231/14) [2015] ZACC 25; 2015 (6) SA 32 (CC) (20 August 2015).
[20] Zoë Mahopo "Vigilantes pickaxe pensioner" *Sowetan* (13 June 2015).
[21] Law, Race and Gender Research Unit *Law, Custom and Rights* newsletter (August/September 2011), available at http://www.cls.uct.ac.za/usr/lrg/downloads/LRG_News_AUG_SEPT2011.pdf.
[22] Monica de Souza "Justice and legitimacy hindered by uncertainty? The legal status of traditional councils in North West Province" *South African Crime Quarterly* Vol 49 (September 2014).
[23] Pearlie Joubert "Women's minister whacks chiefs bill" *City Press* (22 September 2012).

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June 2013 the Constitutional Court declared that the President's dethronement of AmaMpondo King Justice Mpondombini Sigcau, based on a decision by the Commission, had no legal effect. There has also been a concerning lack of transparency around provincial committee reports and recommendations after their investigations have been concluded – in North West province claimants have resorted to litigation in order to uncover the outcomes of their claims. At the end of 2015, this litigation forced North West Premier Supra Mahumapelo to publicly announce the North West committee's findings in respect of the incumbent to the Bakgatla ba Kgafela senior traditional leadership position.[24] The committee found that the current incumbent should be deposed with immediate effect since he was appointed through the interference of the former Bophuthatswana government and contrary to Bakgatla ba Kgafela customary law.[25] Yet, because the Commission has only the power to make recommendations (following a 2009 amendment of the Framework Act), it is within the Premier's discretion to implement the Commission's findings or reject them.[26] This raises doubt about the extent to which re-entrenched apartheid structures have actually been, and can be, transformed by a mechanism such as the Commission.

Against this background and notwithstanding existing failures, the Bill retains the Framework Act's transformation mechanisms to mitigate clause 70's "transitional" re-entrenchment of colonial and apartheid traditional institutions. A new mechanism for reviewing the status of all existing headmen within three years after the Bill becomes law is also created. However, the Bill goes further to remove the protection in the Framework Act that resulted in old tribal authorities having a vulnerable legal status when they failed to meet the election and gender composition requirements for new traditional councils.[27] Although the Bill states that compliance with the composition requirements for traditional councils is mandatory, there is no real consequence for traditional councils who fail to meet the requirements in time. The Bill states merely that the Minister of Traditional Affairs can intervene to "ensure" that traditional councils obtain the correct number of elected and women members. This is hardly sufficient considering the lack of transformation of traditional institutions to date.

Conclusion

As outlined above, it is submitted that the Traditional and Khoi-San Leadership Bill of 2015 should be rejected by the Committees of Parliament on the basis that it re-entrenches the "tribal" boundaries and structures that underpinned the creation of the Bantustans under apartheid. Any democratic recognition of authority for traditional institutions cannot be based on these boundaries, but must instead be based on a system of customary affiliation. Traditional communities should be defined in terms of self-identification, not according to apartheid "tribal" classification. This means that the basic schema of the Bill is flawed, and requires an overhaul based on the lived experiences and histories of customary groupings. In the Bill's treatment of Khoi-San institutions, a precedent has been set for the recognition of customary identity through affiliation rather than territory. This could provide the starting point for an alternative approach to the regulation of traditional institutions in the former Bantustan areas of South Africa.

[24] Bafokeng Land Buyers' Association "Merafe Ramono, the new chief of Bakgatla-ba-Kgafela" (12 January 2015, press statement).
[25] Commission on Traditional Leadership Disputes and Claims: North West Provincial Committee *Report and recommendations on the traditional leadership dispute of Bakgatla Baga Kgafela by Mr Merafe Ramono against Kgosi Nyalala Pilane for Senior Traditional Leadership position* (2014).
[26] Monica de Souza Louw "Will North West premier depose tainted tribal leader?" *GroundUp* (25 January 2016).
[27] Centre for Law and Society "Questioning the legal status of traditional councils in South Africa" (August 2013), available at http://www.lrg.uct.ac.za/usr/lrg/downloads/CLS_TCStatus_Factsheet_Aug2013.pdf.

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